SUPREME COURT, U. S.

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In The

Supreme Court of the United States

October Term, 1971

No. 71-222

JAMES DE MASI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

JAMES DE MASI,

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner James De Masi respectfully prays that this Court issue a Writ of Certiorari to review the order of the United States Court of Appeals for the Second Circuit affirming petitioner's conviction for the crimes of violation of the Hobbs Act (two counts) and one count of conspiracy to violate that Act.

Opinion Below

The Court of Appeals affirmed the judgment of conviction on July 9, 1971, and granted a stay of mandate pending Certiorari on July 26, 1971.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1). The last proceeding in the United States Court of Appeals, namely a stay of mandate pending a petition for certiorari, occurred on the 26th of July, 1971, and the judgment itself was affirmed on July 9, 1971.

Questions Presented

1. Whether Petitioner's rights to a speedy trial under the Sixth Amendment of the United States Constitution and Rule 48(b) of the Federal Rules of Criminal Procedure were violated by virtue of the Government's failure to bring him to trial until October 26, 1970, although the indictment itself was returned March 23, 1967, and a motion to dismiss for lack of speedy prosecution had been made and denied six months before trial?

2. Whether petitioner's rights to a fair trial under the Fifth Amendment were violated by the Trial Court's admission of hearsay thus depriving De Masi of a Sixth Amendment right of confrontation?

3. Whether there was a proper determination that interstate commerce was affected or in-

volved as required by the Hobbs Act?

Constitutional and Statutory Provisions Involved

The Fifth and Sixth Amendments of the United States Constitution; Rule 48(b) F.R.Cr.P.: the Hobbs Act; and Section 371 of Title 18 U.S.C. are involved.

Statement of the Case

Introductory

It is significant herein that the events relating to the conspiracy date back to the year 1963, and that the indictment itself dates back to March 23, 1967. The trial of the petitioner herein began in the latter part of October 1970, which is about 42 months after the indictment and about 84 months after the incidents upon which the indictment was predicated.

It is uncontested that in 1967 the petitioner responded that he was "ready" for trial. In an affidavit of his attorney (Vincent W. Lanna, Esq.) dated April 15, 1970, a motion to dismiss for lack of speedy trial was made. But this must be read in conjunction with the affidavit of the petitioner himself, dated April 10, 1967, wherein he even then declared that the events of 1963 were so distant that it would be extremely difficult to recollect the facts so far back.

The trial nevertheless was delayed for another 3 1/2 years, about six months of which followed a motion to dismiss for want of a speedy

trial.

The facts of the case itself indicate that an essential witness, Vincent Aiello ("Cha Cha") had died in the interim and thus "prejudice" is apparent, if for no other reason, but there are others.

While this case involves the Hobbs Act, we submit that there is a serious question as to whether or not actual interstate commerce was proved. It is true that a long list of items including liquor and whatnot clearly were not manufactured in the State of New York and had to be shipped across state lines and perhaps across international boundaries. This, however, would be the case in virtually every conceivable business in the United States since even purchasing a pencil would unquestionably be linked to some interstate activity since the ingredients necessary to manufacture a pencil no doubt originally crossed a state line at some time. For all intents and purposes, however, the alleged threats and extortion involving a night club located in New Rochelle, New York, known as the Round-A-Bout Club, were all of a local nature and it is by the most extraordinary type of "Pickwickian" reasoning that one could assume that interstate commerce was effected.

Although it is maintained that the denial of a speedy trial here is patent and that reversal is warranted on that basis alone, nevertheless there are additional errors which merit this Court's consideration such as the introduction of hearsay by repeating the declarations of the deceased Vincent Aiello ("Cha Cha") and the Court's rulings with respect to other evidentiary matters.

The Facts of the Case

The trial herein was of relatively short duration and it is not essential that they be detailed in extenso.

The main witness for the prosecution was Edward M. Blackoff who was the owner of the Round-A-Bout Club in New Rochelle. The Court, over vehement objection, permitted Blackoff to testify as to certain conversations he had with his then bartender Vincent Aiello known as "Cha Cha" (57-60).[1] According to this conversation Aiello told Blackoff that he could expect a visit from a group of "well-known racket men" (59).

A few days later Blackoff testified that the co-defendant Nicola Melillo, to whom he was introduced as "Nicky Nelson" and his bodyguard called "Matty", visited his club (60). In addition to Nelson, the witness declared that he also saw the petitioner who was called "Jimmy Dimps" (61). During this visit two men began shouting and became disruptive at the bar. Matty approached them and spoke with these disruptive individuals but it appeared to have no effect on them whatsoever, the witness recalled.

Nicky Nelson, however, then walked over and both men then became very quiet and Matty and Nelson took them by the arms and led them out of the door (62, 63).

Later that same evening Blackoff stated that

1. Numerals in parenthesis refer to the official court reporter's minutes of trial unless otherwise indicated.

he had some conversations with Matty and Nicky Nelson and that Nelson was upset because those disruptive men "hadn't respected him" and Nelson asked Blackoff to try to learn their identities and if he was successful to let Nelson know immediately (67). The petitioner at this conversation declared that because these men had not shown "respect" for Nelson that "they deserved to get their lumps" (67). At this time not only was the petitioner, Nelson and Matty present with Blackoff, but also Jack Withrow who managed the bar (68).

About a week later Blackoff said that the two disruptive men returned to the club and approached him and Withrow stating they had a pistol and that they wanted money because one of them alleged that his suit had been torn in the scuffle. They also threatened that they would wreck the club if the suit was not paid for (68, 69). A check for $138 was given to the men but it was never cashed (69, 70). Blackoff declared that he had taken the license number of the car in which these two persons were driving and notified the police. Blackoff was referring to the local police, especially one Detective Smith, to whom he had explained what had occurred including the demands for money and the threat with the pistol (72). Detective Smith was given the license plate number and returned a few days later telling Blackoff that apparently the owner had no criminal record and consequently there was nothing to be done — Smith actually ignored the entire matter (73). Some time thereafter, Nelson and Matty returned and Matty apparently was still concerned over these two individuals who had not "respected"

Nelson. Again prosecution introduced a conversation with the deceased "Cha Cha" to the effect that he told Blackoff that the men had been found to be connected with other gangsters (78, 79).

Blackoff declared that during the month of June on a Friday, he saw petitioner De Masi in the club and the latter was swearing, shouting and creating a disturbance during which time he broke about 15 glasses (81). Blackoff declared that he tried to calm De Masi down and the latter complained because Blackoff allegedly was using Nicky Nelson's name and said "I'm going to fix you and will see you about that."

Over objection, Blackoff was permitted to relate that he had "heard that these men were gangsters" and that he was "scared" because he had heard that De Masi was a former boxer and that he was "very tough and had a record for beating people up" (84, 85).

Subsequently Blackoff said that Matty asked to talk to him privately in front of another restaurant, namely the Dream Lounge, where, allegedly, Matty told him that because he had been using Nicky Nelson's name for protection that he would have to pay for it. Further, he said that Blackoff would have to hire Matty as the club manager and put him on the payroll (97). Blackoff declared that he explained that he already had a manager whom he had brought up from Florida but Matty remarked that it didn't make any difference and that he would have to "fire him" (97). The Court permitted, over objection, the description by Blackoff of his own state of mind at this time stating that he was "deathly afraid" (98).

Blackoff further testified that he had conversations with another party, namely a Mr. Lomanno, at "The Irish Bar" and the Court permitted Blackoff to testify that Lomanno told him that Nicky Nelson was not known to him as being an "all powerful type" but that he had heard of him (101). Incidentally, the Government declined to turn over certain information concerning Blackoff's address even to counsel, alleging that the witness has had some rather vague problem as a result of this matter (113-114).

[The Court continued its policy of permitting hearsay conversations between Blackoff and Detective Smith which were clearly out of the presence of the petitioner and appropriate exceptions were taken (117, 118)].

The witness delcared that he had never actually seen the petitioner with either Matty or co-defendant Nelson (163).

A James Lomanno testifying for the prosecution stated that he was in the meat business in Darien, Connecticut in 1963 (214, 215). He stated that in 1963 he had a conversation with the witness Blackoff who told him that he was being bothered by some people from New York and Lomanno suggested that he go to the police (216). He stated that he and Blackoff went to a place in Riverdale and that they spoke to some person there concerning Blackoff's problem (217). [Petitioner's counsel objected to this entire line of direct examination on the grounds that it was inadmissible hearsay (217)].

John G. Withrow testifying for the Government stated that he was presently a Fire Captain in Boca Raton, Florida. Withrow, however, declared that he managed a nightclub in New Rochelle known as the Round-A-Bout and, of course, had known Mr. Blackoff (219-221). Withrow declared that he knew the petitioner as Jimmy Dimps (222, 223). Withrow further declared that a bartender worked in the Round-A-Bout Club by the name of "Cha Cha". Over objection the witness was permitted to relate a conversation with "Cha Cha" to the effect that "there was a racketeer coming up from down in the Bronx on Saturday night and bringing a lot of people up" (225, 226). He stated that Cha Cha Aiello introduced him to the "racketeer and his party" when they arrived (226). He stated that at this time he saw Matty and Nicky Nelson along with other persons, including the manager of the Dream Lounge by the name of "F.O.". Included in the party, Withrow recalled, was Jimmy Dimps (228).

Withrow then related, with some minor variations, the incidents that Blackoff testified to. One of the incidents that Withrow recalled occurred at the bar in the presence of Blackoff and one Peter Savanello. The petitioner had busted some glasses and was apparently very angry and Savanello told him to "cut it out" and declared that it was of interest to him because he, Savanello, "owned a third of the business" (248). At another point Withrow testified that petitioner came in with ten or twelve people with their collars turned up and they were standing at the bar. He stated that Cha Cha Aiello was being harassed and shouted "Why don't you guys let me alone?

This is the first legitimate job I ever had; you guys won't even let me alone; a guy can't even get up" (265).

On cross-examination Withrow declared that no one ever introduced Matty as Nelson's bodyguard. Withrow also apparently contradicted certain statements which he had given to the F.B.I. in Florida (323-326). As a matter of fact, he stated that some parts of what the F.B.I. agent recorded in Florida was incorrect.

Pasquale Di Napoli testifying for the prosecution stated that he was a retired police officer for the City of New Rochelle and had held the rank of lieutenant (336-338). He stated that Blackoff told him that there were persons hanging around demanding "a piece of the action" (338). Di Napoli also observed a black Cadillac on one occasion (339).

The Defense

The petitioner called several witnesses who testified in his behalf, including Alexander Mauriello, Peter Savanello, and Joseph Prunesti. These witnesses knew the petitioner. The Court refused to permit a conversation between Mauriello and the deceased Vincent Aiello ("Cha Cha") despite the fact that it had permitted such conversations on the Government's direct case (348). Mauriello stated that he did not know Nicky Nelson nor Matty (350). Mauriello stated that Blackoff had approached him on one occasion at the Round-A-Bout Club and stated that he was having trouble with some people who were trying to "muscle in" and give him a hard time (349, 350). These per-

sons, Mauriello recalled, received a check from Blackoff in the presence of himself and Peter Savanello. De Masi was not present.

Peter Savanello, testifying for the defense, stated that he knew James De Masi and also Edward Blackoff, the latter being the owner of the Round-A-Bout Club (362, 363). He described the same incident that Mauriello had described and was fairly consistent with the latter's testimony (365, 366). Savanello described an incident when he was present with petitioner and his future wife as well as his own future wife (370). This occurred at the Round-A-Bout Club at which time De Masi was described as being very mad and broke three glasses (371). This incident was precipitated by virtue of the fact that Blackoff had made a pass at De Masi's wife (372, 373). He stated that he did not know Nicky Nelson (380).

Joseph F. Prunesti, testifying for the defense, stated that he knew the petitioner (392). He stated that he and De Masi had gone into the Round-A-Bout Club and that the bartender "threw a tab" at them and that it was somewhat embarrassing (395, 396). Prunesti also recalled the incident described by the prior defense witnesses when De Masi broke two or three glasses (397).

The final witness for the defense was George Pierro who testified that he was a lifelong resident of New Rochelle and was 36 years of age. He stated that he knew the petitioner for fifteen or twenty years (411). Pierro asserted that he had been a customer of the Round-A-Bout Club and that it did a fairly nice business and that he

had never refrained from going there because of violence (412-414).

Argument

Point I

THE PETITIONER WAS DENIED A SPEEDY TRIAL IN VIOLATION OF RULE 48(b) F.R.Cr. P. AND THE SIXTH AMENDMENT IN VIEW OF THE FACT THAT THE INDICTMENT WAS RETURNED ON MARCH 23, 1967, AND RELATED TO INCIDENTS WHICH OCCURRED IN THE MIDDLE OF 1963. THE CASE ITSELF WAS NOT TRIED UNTIL OCTOBER 26, 1970, DESPITE THE FACT THAT A MOTION TO DISMISS THE INDICTMENT FOR LACK OF PROSECUTION HAD BEEN MADE AND DENIED SIX MONTHS EARLIER.

The petitioner herein was tried beginning on or about the 26th of October 1970, which followed by approximately six months a motion to dismiss the indictment for lack of speedy prosecution. There was some effort at an excuse made because of the fact that a co-defendant, Nicola Melillo (Nicky Nelson), had been brought to trial somewhat earlier although his case culminated in a plea of guilty. The petitioner's counsel submitted an affidavit on the 15th of April 1970, and related that on the 8th day of June 1967, before District Judge Thomas Murphy, he had answered the trial calendar "ready for trial."

In an affidavit submitted on the 10th day of April 1967, by the petitioner himself in connection with certain motions seeking a dismissal of the

indictment and other relief, De Masi called the Court's attention to the fact that an extremely long period of time had already elapsed since the time of the incidents alleged in the indictment and the Grand Jury's finding of a true bill.

It is very significant therefore that from the incidents alleged in the indictment to the date of trial, approximately 84 months elapsed or, to put it another way, about 7 years time. When the indictment itself was finally returned, 3-1/2 years elapsed before that bill was finally brought to trial. This was only following a motion by the petitioner De Masi to dismiss the indictment. The Government gave some rather lame excuses that they were trying to ascertain the name of the third defendant, who is still described as "John Doe", and that in the interim they had moved the case against Nicola Melillo.

The delay here, however, was completely unconscionable and it is respectfully submitted that absolutely no valid excuse has been offered.

In 1844, an English Judge dealing with a problem similar to that presented herein, opined very aptly (Regina V. Robins, 1 Cox C.C. 114):

> "I ought not to allow the case to go further. It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? . . . [I]f the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust

to put him on his trial." (Emphasis supplied.)

See,

Dickey v. Florida, 398 U.S. 30 (1970); 5 Stan. L. Rev. 95, 104, 1952, "Justice Overdue - Speedy Trial for the Pre-Trial Defendant."

In Mann v. United States, 304 F.2d 394, 396-397 (D.C. Cir. 1962), the Court similarly noted:

"Indeed, a suspect may be at a special disadvantage when complaint or indictment or arrest, is purposefully delayed. With no knowledge that the criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime." (Emphasis supplied.)

Moreover, there is no way a suspect can compel or insist that the government commence a prosecution; nor can a defendant determine when or if the government may decide to prosecute. The "Sword of Damocles" may hang for the whole period of limitations!

In Pollard v. United States, 362 U.S. 354, 361-362 (1957), the Supreme Court not only equated "purposeful" delays with the "oppressive" ones forbidden by the Sixth Amendment, but also interpreted United States v. Provoo, 350 U.S. 857 (1955); affirming Petition of Provoo, D. Md., 17 F.R.D. 183 (1955), as condemning delay "caused by the deliberate act of the Government."

It is apparent from Pollard v. United States, supra, at 352 U.S. at 361, that the Supreme Court indicates that even an indictment within the limitation period may come too late to square with the Sixth Amendment. (See Mann v. United States, supra, 304 F.2d at 396-397; n.4; Taylor v. United States, 238 F.2d 259 (D.C. Cir. 1956); Nickens v. United States, 323 F.2d 807 (D.C. Cir. 1963); United States v. Provoo, supra.) See 18 U.S.C. §3282.

In Provoo, as in Taylor, delay before trial was one of the combination of factors, which, in sum, affected a denial of the right to a speedy trial. The importance of this factor to the decision in Taylor was emphasized in James v. United States, 261 F.2d 381 (D.C. Cir. 1958), cert. denied, 359 U.S. 930 (1959). The delay in the case at bar occurred not only between the alleged commission of the offense and the finding of an indictment, but also between complaint and indictment or indictment and trial. (Cf. Rule 48(b) F.R.Crim.P.) The delay which occurred herein, is just as prejudicial and serious as any other delay, and clearly should not be immunized from the mandates of the Fifth and Sixth Amendments.

Some courts have held a complaint and indictment may be delayed with impunity, without regard to the right to speedy trial, because the time of indictment is governed by the statute of limitations. See cases mentioned in Mann v. United States, supra. But the constitutional right cannot depend upon the terms of a statute. As an act of legislature, the period of limitations may be extended. See Act of September 1, 1954, c. 1214,

§12(a) (formerly §10(a)), 68 Stat. 1145. The period may be done away with. Compare 18 U.S.C. §3281 (1951). The period may be made to run from the time the offense becomes known to the authorities until the time of indictment, or from the time of indictment until the time of trial, or from the actual time of the offense until the time of trial. Compare LSA-R.S. 15:8 (1951) with La. Act No. 25 of 1960. The Legislature is free to implement the constitutional right and to provide protections greater than the constitutional right. But the minimum right of the accused to a speedy trial is preserved by the command of the Sixth Amendment, whatever the terms of the statute. And that minimum right is measured by a flexible standard which takes account of all the circumstances. See Beavers v. Haubert, 198 U.S. 77, 87, 25 S.Ct. 537, 49 L.Ed. 950 (1905).

In Godfrey v. United States, 358 F.2d 850, 852 (D.C. Cir. 1966), the Court of Appeals observed:

> "We note that although the total lapse of time from offense to arrest was about four months, two months of that period was not protected, in terms of reasonableness, by any purpose to advance the public interest in effective law enforcement. The District Court appears to have been of the view that, where delay to serve the purpose of the public occurs, with inevitable impact upon the interests of the accused, there is an obligation on the police to be as diligent as possible in making the arrest, to the end that the accused may know as soon as possible of the charge against him. We agree.

> The disadvantage to the accused inherent in the deliberate preference accorded the public interest in the one period should not be compounded by a failure to exercise appropriate diligence in the other."

In United States v. Godfrey, 243 F. Supp. 830, 831 (U.S.D.C., D.C. 1966), the District Court received the case on a remand from the United States Court of Appeals for the District of Columbia, for the purpose of determining,

> "the reasonableness vel non of the delay occurring between the dates of the alleged offense by appellant, the filing of the complaint, and the issuance of the arrest warrant, and the appellant's arrest, and the effect, if any, on the defense of the case . . . . "

See also Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965). In Ross, the Court of Appeals (349 F.2d at 211) proclaimed:

> ". . . We think a record of this kind more accurately may be deemed as presenting a question akin to a Fifth Amendment, due process issue, centering around Appellant's ability to defend himself." (Emphasis supplied.)
>
> See, United States v. Agone, 302 F. Supp. 1258 (S.D.N.Y. 1969).

In Ross, the Court observed that a delay between the commission of the offense and the pros-

ecution of a protracted nature might well constitute a denial of due process of law. It should be noted that in Ross v. United States, supra, the Court was not merely articulating its supervisory power over district courts in Washington, D.C.

In Nickens v. United States, supra, 323 F.2d at 812 and 813, the Court recognized that the right of a suspect to a speedy trial is not lost merely because the delay in prosecution occurred before the formal charge rather than after. . .

In Hanrahan v. United States, 348 F.2d 363 (D.C. Cir. 1965), the Court of Appeals declared (id. at 366):

> "Rule 48(b), Fed.R.Crim.P., if in the Sixth Amendment, in terms requires the prosecutor to proceed without 'unnecessary delay.' The prosecutor's responsibilities under these provisions begin, not when the indictment is returned, but when the prosecution is begun."

See also Connady v. United States, 351 F.2d at 817, 818 (D.C. Cir. 1966); United States v. Kojima, 3 Hawaii Fed. 381 (1909); United States v. Henning, 15 F.2d 760, 861 (9th Cir. 1926); United States v. Sanchez, 361 F.2d 824 (2 Cir. 1966); United States v. Rivera, 346 F.2d 942, (2 Cir. 1965); United States v. Hammond, 360 F.2d 688 (2 Cir. 1965); United States v. Wilson, 342 F.2d 782 (2 Cir.), cert. denied, 382 U.S. 960; United States v. Simmons, 338 F.2d 804, 806 (2 Cir. 1964); cert. denied, 380 U.S. 983.

See also D'Ercole v. United States, 361 F.2d 211 (2 Cir. 1966); United States v. Lustman, 258 F.2d 475 (2 Cir. 1958). While Lustman is distinguished in the opinion of this Court herein, it has logic and reason behind it.

See also, 2 Pomeroy, Equity Jurisprudence, §§418, 419 (5 Ed. 1941); 2 Story, Equity Jurisprudence, §1526 (13 Ed. 1886).

It should be noted, incidentally, that while the Court in Sanchez, supra, distinguishes the Ross case as being an exercise of supervisory powers by a sister circuit, the sweeping pronouncements in Ross clearly transcend mere supervisory jurisdiction.

In United States v. Lustman, supra, this Court considered the affect of a very prolonged delay from the point of view of whether "prejudice" need be shown. At 258 F.2d 477, 478, that Court declared:

> ". . . A showing of prejudice is not required when a criminal defendant is asserting a constitutional right." [Citing cases.] Continuing, this Court explained:
>
> "Thus we assume that the unexcused delay of approximately four years was an undue delay within the meaning of the Sixth Amendment even though appellant has not shown that it prejudiced him in the prosecution of his defense."

See: cf. United States v. Alo, Docket No.

35579; Klopfer v. North Carolina, 386 U.S. 213 (1967); United States v. Ewell, 383 U.S. 116, 120.

Mr. Justice Roberts observed in Sorrells v. United States, 287 U.S. 435 (1932), in which Mr. Justice Brandeis and Mr. Justice Stone concurred, that:

> "The efforts. . . to obtain arrests and convictions have too often been marked by reprehensible methods. . . Justice Robert's continued by referral to thse methods as a 'prostitution of the criminal law.'" (id. 287 U.S. at 457).

Justice Brennan in Abbate v. United States, 359 U.S. 187 (1959), at 200, likewise cautioned:

> "The prime consideration is the protection of the accused from the harassment . . . and not the justification for or policy behind the statutes violated by the accused." Abbate v. United States, supra, at p.200 (Brennan, J.)

That the Fifth Amendment does not tolerate what happened here seems to appellant to be absolutely certain, for "a principle to be vital must be capable of wider application than the mischief which gave it birth," and "[i]n the application of a constitution ... our contemplation cannot be only of what has been but of what may be." Weems v. United States, 217 U.S. 349, 373 (1910).

The caution of Judge Cooley, in his monumental

work on the Constitution, is appropriate:

> "In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them immense power for oppression; and it is to be feared they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused. . . .
>
> It is the duty of the prosecuting attorney to treat the accused with judicial fairness; to inflict injury at the expense of justice is no part of the purpose for which he is chosen. Unfortunately, however, we sometimes meet with cases in which these officers appear to regard themselves as the counsel for the complaining party rather than impartial representatives of public justice." I Cooley, Const. Lim. (8th Ed.) 646. (Emphasis added.)
>
> See: Curtis v. State, 6 Cold. 9.

In Weems v. United States, supra, the Supreme Court recognized that even though courts may have interpreted the Constitution in a narrow sense heretofore, courts must nevertheless recognize that wider applications frequently must be applied to changing or new conditions. Thus, in 217 U.S. at 373, our highest court proclaimed:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, necessarily be con-

> fined to the form that evil had heretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions."

The plain fact of this case reveals that an unconscionable long period of time elapsed between the finding of the indictment and the incidents upon which it was predicated. An additional period of some 42 months elapsed before the case was actually brought to trial and it is submitted that were it not for the motion to dismiss for matter of speedy prosecution which was made in early 1970, it is doubtful that the case would have been brought to trial even at the extremely late date that it was.

Although the motion to dismiss itself would warrant the relief requested, it should be pointed out that an extremely important witness, Vincent Aiello ("Cha Cha"), the bartender at the Round-A-Bout Club, died during this long hiatus and, consequently, the petitioner was deprived of an essential witness. The Government's claim that Aiello would have been an important prosecution witness does not diminish the virulence of the prejudice but lends support to it by virtue of the fact that the Government acknowledges that Aiello was an important witness.

Under the circumstances and in view of the foregoing authorities, it is submitted that this Court should reverse and dismiss the indictment on this basis alone.

Point II

THE PETITIONER WAS PREJUDICED BY RULINGS OF THE COURT WITH RESPECT TO THE ADMISSION OF HEARSAY AND WAS IN ESSENCE DEPRIVED OF A RIGHT OF CONFRONTATION. THIS WAS PARTICULARLY TRUE WITH RESPECT TO THE USE OF STATEMENTS OF THE DECEASED BARTENDER VINCENT AIELLO ("CHA CHA").

The case at bar involved a violation of the Hobbs Act and, consequently, it was necessary to prove the making of threats and extortive conduct. During the course of the Government's presentation of evidence the main Government witness, Blackoff, who owned the Round-A-Bout Club which was apparently the main object of the conspiracy herein, had to establish his state of mind as well as a description of the petitioner and the co-defendants (not tried with De Masi) as being racketeers or gangsters.

At this juncture it is perhaps appropriate to call this Court's attention to the fact that an essential witness in this regard was the deceased bartender Vincent Aiello ("Cha Cha"). It is respectfully submitted that one of the fundamental aspects of prejudice in connection with the denial of a speedy trial was the unavailability of Aiello because of his unfortunate death.

The Government, however, very nicely managed to "have its cake and eat it too" because the Court permitted the prosecution to refer to conversations with the bartender, "Cha Cha", and to quote his

language with Blackoff to the effect that some racket men were going to visit him and that the petitioner and his compatriots were "gangsters." Over vehement objection by the defense the Court permitted Blackoff to testify to these conversations although admittedly the petitioner was not present at that time. The entire context of the prosecution's case was set into focus without any possibility of cross-examination when the Court permitted Blackoff to quote "Cha Cha" as telling him:

> "Well he said that we could expect to be visited by a group of well known racket men" (59).

At another point the Court permitted Blackoff to testify that the bartender told him that the petitioner and his friends were "gangsters."

It must be borne in mind that the petitioner herein did not take the stand. Thus his character should not have been placed in issue especially since he called no character witnesses either. The insidious nature of the Court's ruling that the Government could nevertheless adduce several conversations with the bartender, precluded a fair trial here and was also completely impermissible hearsay. The Government relied upon United States v. Tropiano, 418 F.2d 1069 (2 Cir. 1969) as permitting them to introduce this sort of hearsay. The Court, however, in Tropiano, noted that the Court there had cautioned the jury three times and gave extremely careful instructions to the talismen. That was not done here and although the Court in the case at bar did give some instructions, certainly no immediate cautionary in-

struction of sufficient force was articulated to counteract the virulent effect of this testimony.

The testimony of the witnesses offered by the prosecution such as Blackoff and Withrow obviously would have contained references to certain threats. The testimony offered by the defense as well as the cross-examination of the Government's witnesses, would very likely have neutralized the testimony of Blackoff and Withrow since presumably they could not have testified of their own knowledge as to their belief that the petitioner De Masi and the co-defendant Melillo were "gangsters" and "racket men." A threat articulated by a customer in a bar would not nearly have the same significance as one voiced by someone who has been described as "a gangster" and a "racket man." Thus the testimony of Blackoff as well as Withrow to the hearsay conversations with Aiello ("Cha Cha") were extremely important to the establishment of the Government's case.

It is ironic that the petitioner in presenting his defense was precluded by the Court's ruling from offering a hearsay declaration of this same bartender, "Cha Cha." Certainly, even-handed justice was required.

This hearsay violated the confrontation clause of the Fifth Amendment and, consequently, precluded cross-examination of the declarant, "Cha Cha" Aiello (Rule 26, F.R.Cr.P.; Mattox v. United States, 156 U.S. 237, 242 and 243 (1895); Douglas v. Alabama, 380 U.S. 415, 418-419 (1965); Pointer v. Texas, 380 U.S. 400 (1965); Busby v. United States, 296 F.2d 328, 332, cert. denied 369 U.S.

876, and McCormick, Evidence, Section 225 (1954).

See also the extensive discussion of the confrontation clause in California v. Green, 399 U.S. 149 (1970).

No doubt the vice of the inclusion of a "conspiracy" count permitted the Government to argue that anything they wanted was admissible.

Conspiracies cannot be deemed to have existed in vacuo. The caution of Justice Jackson in Krulewich v. United States, 336 U.S. 440 is very apt in this regard (id. at 457):

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. . . . And I think there should be no straining to uphold any conspiracy conviction where [as herein] the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction." (Emphasis ours.)

The Court noted in United States v. Falcone, 109 F.2d 579, 581 (2 Cir. 1940), aff'd 311 U.S. 205 (1940):

> ". . . today when so many prosecutors seek to sweep within the drag-net of conspiracy

> all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided." (Emphasis ours.)

As a matter of fact the Court in United States v. Jones, 402 F.2d 851 (1968) had occasion to note that the omission to afford an opportunity to cross-examine required reversible error where testimony against the defendant was introduced.

The vice of the trial court in permitting this testimony is also seen in the fact that Blackoff could have said that Aiello told him anything in the world and nobody could possibly disprove this because Aiello's lips were sealed by death (cf. Alford v. United States, 282 U.S. 267; and Smith v. United States, 390 U.S. 129, 131, 132). There can be no doubt but that the Sixth Amendment of the United States Constitution guarantees the "right. . .to be confronted with witnesses. . . to have compulsory process for obtaining witnesses in his favor. . . ." This right was denied to the petitioner herein in respect of perhaps the most virulent testimony of the entire case.

There were several other instances where the Court created error in this regard even with respect to persons other than the bartender. This was in reference to conversations which Blackoff related that he had with Detective Smith who referred to the defendants as "troublemakers" (117, 118).

It might also be pointed out that in regard to the Alford and Smith cases, supra, the failure of the trial court to permit the defendants to obtain Blackoff's address was error as those cases specifically held.

Point III

THE INDICTMENT HEREIN REQUIRED THE GOVERNMENT TO PROVE AN EFFECT UPON INTERSTATE COMMERCE. THIS WAS NOT PROVED EXCEPT BY "PICKWICKIAN" REASONING.

In this case the petitioner was accused of violating the Hobbs Act which, of course, requires that the Government prove that there was an aspect of interstate commerce involved. The Round-A-Bout Club was located in New Rochelle, New York, and unquestionably did no business across state lines except in the most "Pickwickian" sense. Thus it appears that because the petitioner allegedly made some threats that this gave the Federal Government jurisdiction solely by reason of the coincidence that certain foodstuffs were purchased from sources outside the state. To carry this line of reasoning to a dryly logical extreme would mean that every single business in the United States is subject to Federal jurisdiction because it is not possible to believe that at least one article of every establishment, even a corner peanut vendor, has not been acquired from a source outside the state. For example, peanuts are not, so far as we know, indigenous to the State of New York, and unquestionably, cross state lines before they are delivered to the corner peanut vendor. The same would be true of every establishment

because even if only a pencil were purchased, there is no doubt that the graphite in the pencil came from a source outside the state.

The essential nature of the business, however, is clearly what determines interstate commerce and we maintain that the Round-A-Bout Club was a local nightclub which could not possibly be deemed engaged in interstate commerce. (See Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 [1964]; Katzenbach v. McCluny, 379 U.S. 294 [1964]; Maryland v. Wirtz, 392 U.S. 183 ([1968]; and see dissent in United States v. Perez, 426 F.2d 1073 [2 Cir. 1970], affirmed, 91 S.Ct. 1357 (1971).

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1002—September Term, 1970.

(Argued May 14, 1971 Decided July 9, 1971.)

Docket No. 71-1050

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES DEMASI,

Appellant.

Before:

FRIENDLY, *Chief Judge,*
WATERMAN, *Circuit Judge,* and ZAVATT, *District Judge.**

Appeal from a judgment, United States District Court for the Southern District of New York, Murphy, *J.*, convicting appellant, after a jury trial, on two counts of violating the Hobbs Act and one count for conspiracy to violate it. Affirmed.

JAMES SCHREIBER, ROBERT G. MORVILLO, Assistant United States Attorneys, Whitney North Seymour, United States Attorney, *for Appellee.*

* Of the Eastern District of New York, sitting by designation.

Opinion

IRVING ANOLIK, New York City, *for Appellant.*

WATERMAN, *Circuit Judge*:

After a trial before a jury, appellant James DeMasi was convicted on two counts of violating the Hobbs Act (18 U.S.C. §1951) by interfering with interstate commerce through attempts to gain control of a night club in New Rochelle, New York, by force and violence, and was also convicted on one count of conspiring to violate that section. He was sentenced to concurrent sentences of ten years on each count, but has been enlarged on bail pending determination of this appeal.

The events giving rise to this prosecution occurred in 1963. Sensing an unexploited market for a "family-type" night club in New Rochelle, one Edward Blackoff, in March of that year, opened the "Round-A-Bout Club" which provided restaurant and bar facilities as well as a bandstand for "live" music. Sometime in April appellant, also known as "Jimmy Dimps," visited the Club around closing time and asked to speak to Blackoff. In the presence of the Club's manager, Jack Withrow, appellant related that he had heard that Blackoff had said that "no racket guys or unsavory characters were going to be allowed in the Club and that he in particular was barred." Blackoff denied that he had made the statements. He added that he did not know appellant and he concluded the conversation by assuring DeMasi that he was welcome as long as he behaved himself. Appellant thereupon became a regular customer, stopping in three or four times a week.

In the early part of May the Club's bartender, Vincent "Cha Cha" Aiello, told Blackoff and Withrow that they "could expect to be visited by a group of well-known racket

men . . . [because they] had heard so much about [the Club]." A few evenings later Aiello introduced three men to Blackoff and Withrow: Nickey Nelson,[1] Matty (Nelson's bodyguard), and "F. O.," manager of a Bronx bar. DeMasi was already present in the bar and these men joined him at a table. Later that night the Club experienced its first disruption. Two men, each over six feet in height, claiming to have been short-changed, broke glasses, shouted obscenities, and created a disturbance. Withrow was unable to calm them. Nelson's bodyguard, Matty, was equally unsuccessful. It was Nelson himself, a man of much smaller size, who escorted the two to the door without resistance. Meanwhile Blackoff, who had heard the commotion while in the restaurant, entered the bar as the men were being ejected. He thanked Nelson and ordered free drinks for his party. Nelson urged Blackoff to learn the identity of the men because they had not respected his presence. DeMasi added that they "deserved to get their lumps," and Nelson gave Blackoff the telephone number of F. O.'s bar in the Bronx, making it clear that he was to be informed if the men returned in order that he could punish them.

About a week later the two troublemakers returned to the Club demanding that they be compensated for damage allegedly done to their clothes when they were ejected. When Withrow refused, the men threatened to wreck the Club. However, Blackoff mentioned that Nelson was looking for them and the men became less adamant in their demand. Blackoff gave them a check and they left.[2] As they were driving away, Withrow copied down the car's license number.

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1 This name was an alias. Nelson's name is Nicola Melillo, but for the sake of clarity we refer to him herein as Nelson.

2 The check was never cashed.

A couple of days later Nelson and Matty appeared at the Club to inquire about the return of the two men. Blackoff and Withrow explained what had happened. Nelson then asked for the license number because, he asserted, he had access to police records and could discover the identity of the car's owner. Further he pledged that the men would be punished. Subsequently, Aiello told Blackoff that Nelson had located the troublemakers who were "connected with other gangsters" and that they had been punished. Blackoff was to consider the matter closed. Nonetheless, the effect of these and later disturbances on the Club's business was dramatic. By June the family groups stopped coming, and business went steadily downhill.

During the earlier part of June appellant became increasingly disruptive while at the Club and frequently refused to pay his bills. On a Friday, after arriving in the company of a woman and another man, he started to swear loudly and break some glasses. He was asked to leave by another customer who claimed that he had a one-third interest in the Club.[3] When appellant heard this, he said, "We will see who owns one-third of this Club," and told Blackoff that, inasmuch as Blackoff had been using Nickey Nelson's name, "I am going to fix you." He then ran to a hallway telephone and made a call. Blackoff overheard DeMasi tell the other party that he was at the Club, that "there was a lot of trouble here," and that his listener should "come up right away." Shortly thereafter Matty arrived with four or five "tough-looking" men and conferred with appellant. Both then approached Blackoff. Matty repeated the charge that Blackoff had used Nelson's name without authority to do so and added that Blackoff would have to pay for it.

3 This statement was false; the Government did not seek to explain why it was made.

Blackoff again denied the charge, and, after further verbal exchanges, DeMasi, Matty, and the others left.

In order to resolve the misunderstanding, Blackoff and Aiello on Saturday drove to the Bronx bar managed by F. O., ostensibly to drop off some glasses F. O. had wanted but, in fact, to see Nelson.[4] Blackoff carried the glasses into the bar and gave them to F. O., who at the time was standing behind the bar counter. Looking into the mirror behind the counter, Blackoff noticed one of the two men who had caused the trouble at his Club and who supposedly had been punished by Nelson. He also saw Matty calmly standing not far from the troublemaker. At this point Blackoff realized that the two disturbances at the Club had been staged, and he sought a quick exit. However, as he neared the door, he was accosted by Matty who repeated the charges from the evening before and demanded in addition that he be made manager of the Club. Blackoff responded that he already had a manager, namely Withrow, but Matty was unimpressed. He told Blackoff that unless he was made manager, the "Club would be wrecked . . ., [he] would be beaten up [and his] wife and child would be beaten with lead pipes filled with cement . . . ." Matty demanded an answer by evening.

Blackoff returned to the Club and related the events to Withrow, a waitress, and Lemanno, a butcher from Connecticut who provided the Club's meat requirements. Lemanno suggested that Blackoff contact some men in the Bronx known to Lemanno who would know about Nelson and Matty so that Blackoff could evaluate the demand, and they left together in search of the information. Soon after, Matty arrived at the Club demanding to see Blackoff.

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4. Previously, when F. O. had been at the Club with Nelson, Matty and appellant, F. O. had admired the "old fashioned" glasses used there and asked Blackoff to order some for his bar.

Withrow explained that Blackoff was not there but Matty decided to await his return. As the delay grew longer, Matty became impatient and struck Withrow.

During the evening Blackoff called the Club to ask if Matty was waiting for him and he received an affirmative answer. He called again still later to speak with Withrow, but Matty grabbed the telephone from Withrow and ordered Blackoff to return to the Club. When Blackoff arrived, Matty struck him, repeated his demands, and warned Blackoff not to contact the police. He said that once he was taken in as manager, he might buy out Blackoff after a year, but he mentioned no price. He also assured Blackoff that should he be made manager, no more men would be demanding money, and that there would be no more disruptions and appellant, especially, would be kept out. Blackoff equivocated, and after a few drinks Matty departed.

On Sunday Withrow learned from a waitress that some men were "going to come up . . . and beat everybody up [in the Club] with lead pipes . . . and smash the Club." That evening DeMasi and approximately fifteen men filed into the Club and marched to the bar, where they proceeded to harass Aiello. Very shortly thereafter Matty called Blackoff to ask how things were going. Blackoff told him that appellant was there with fifteen men who "looked like they were going to start causing trouble" and asked Matty to "get them out." When Matty arrived, he spoke quietly with DeMasi, and, following this talk, DeMasi and his cohorts left.

Blackoff thereupon told Matty that he would not go through with the proposal, saying that he would rather close the Club. Matty repeated his threats but to no avail. Blackoff demanded that he leave and Matty, being coop-

erative, agreed to go if Blackoff would drive him to F. O.'s bar. Blackoff declined but Aiello volunteered.

Aiello returned sometime later that night in a frightened state. He had spoken with Nelson, Matty and F. O., and he told Blackoff that they would give Blackoff "one hour" to reconsider or they would come up and "take care of him." Blackoff listened to Aiello and then ran from the Club to flag down a police car. He explained to the officer what was happening and the officer agreed to watch for Nelson's arrival. Later the officer stopped a car that had been circling the Club; it contained Nelson and an unidentified passenger. Nelson did not enter the Club.

On Monday Blackoff went to the New Rochelle police and disclosed the extortion scheme. In September, 1963, business having fallen off completely, he closed the Club.

The federal grand jury indictment charging appellant, Melillo (Nelson) and a still unidentified "John Doe" was filed almost four years later, in March, 1967. Appellant argues that this lengthy pre-indictment delay violated his right to a speedy trial as guaranteed by the Sixth Amendment and Rule 48(b) of the Federal Rules of Criminal Procedure. However, appellant does not claim that the statute of limitations had run, and, "[w]here there has been a pre-arrest delay the statute of limitations is 'usually considered the primary guarantee against bringing overly stale criminal charges,' *United States* v. *Ewell*, 383 U.S. 116 (1966)," *United States* v. *Feinberg*, 383 F.2d 60, 64 (2 Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968). See also *United States* v. *Quinn* (2 Cir. June 4, 1971). Of course, even within the limitation period, if the delay "impair[s] the capacity of the accused to prepare his defense," it may nonetheless reach constitutional proportions, if the prejudice is proven. *United States* v. *Feinberg, supra* at 65. However, courts will not presume the existence of preju-

dice from the mere fact of delay alone. *Id.* In the instant case no proof of prejudice has been offered. Appellant's freedom of movement was not curtailed nor was he subjected to derogatory publicity or public disdain. Furthermore, appellant has failed to substantiate his naked assertion that the pre-arrest delay hampered his preparation for trial. Apparently no key defense witnesses died or otherwise became unavailable during this period. Additionally, there is no suggestion in the record or elsewhere that potential or actual witnesses were unable to recall the events in the past, or that evidence was destroyed or mislaid. Under these circumstances, then, the pre-arrest delay worked no hardship on appellant.

Neither is there proof that the delay was actuated by a deliberate, purposeful or oppressive design on the part of the Government. *Chapman* v. *United States*, 376 F.2d 705 (2 Cir.), *cert. denied*, 389 U.S. 881 (1967). On the contrary, the Government has explained that the delay was due simply to the fact that the federal authorities did not become involved in the case until very late in 1965 and the year which elapsed between the time of initial involvement and indictment was devoted to investigation and preparation for presentation of the case to the grand jury. Although the constitutional and social imperatives in the speedy trial concept are deeply embedded in our jurisprudence, nonetheless we have also recognized that careful investigation, even at the price of delay, is to be cherished, inasmuch as "[t]ime-consuming investigation prior to an arrest minimizes the likelihood of accusing innocent parties and may facilitate the exposure of additional guilty persons." *United States* v. *Feinberg*, *supra* at 64-65. In the instant case the investigation failed to turn up the unidentified "John Doe," but this does not alter the principle. Weighing these policies, we deem the excuse sufficient.

Nor do we believe that the post-indictment delay was constitutionally intolerable. As we have said so many times in the past, we look to four factors: The length of the delay, the reason for the delay, prejudice to the defendant, and waiver of the speedy trial right by the defendant. *United States* v. *Lustman*, 258 F.2d 475 (2 Cir.), *cert. denied*, 358 U.S. 880 (1958); *U. S. ex rel. Solomon* v. *Mancusi*, 412 F.2d 88, 90 (2 Cir.), *cert. denied*, 396 U.S. 936 (1969).[5] Appellant's argument that he suffered actual prejudice because Aiello died in November 1968, and was unable to testify at trial, is without merit. There is no indication that Aiello would have exculpated appellant had he lived to testify, and, indeed, it appears that Aiello would have been more helpful to the Government than to the defense.

Furthermore, appellant's assertion must fall because he failed to move for a speedy trial. In March, 1970, the Government informed appellant that it would seek to bring this case to trial. Only then did appellant file a motion to dismiss the case for lack of prosecution. The motion was denied. The rule in this Circuit is clear that a motion to dismiss for lack of prosecution is not a proper demand for a speedy trial. *United States* v. *Virga*, 426 F.2d 1320, 1322 (2 Cir. 1970); *United States* v. *Aberson*, 419 F.2d 820 (2 Cir.), *cert. denied*, 397 U.S. 1066 (1970); *United States* v. *Maxwell*, 383 F.2d 437, 441 (2 Cir. 1967), *cert. denied*, 389 U.S. 1057 (1968). Furthermore, "[e]ven were we to treat the [March, 1970] motion to dismiss made by [defendant] as a demand for a speedy trial, which we do not," appellant went to trial six months later, in October, a period not unreasonable in length, *United States* v. *Maxwell*, *supra* at 441. Cf. *United States* v. *Taddeo*, 434 F.2d 228 (2 Cir.

5 See *Second Circuit Rules Regarding Prompt Disposition of Criminal Cases.*

1970), *cert. denied*, 91 S. Ct. 957 (1971); *United States* v. *Simmons*, 338 F.2d 804 (2 Cir. 1964), *cert. denied*, 380 U.S. 983 (1965).[6]

At trial the Government was permitted, over objection, to ask Blackoff and Withrow about statements the deceased Aiello had made to them. The thrust of appellant's argument is that these out of court statements were hearsay and that their admission precluded a fair trial under the Fifth and Six Amendments inasmuch as they contained references to appellant and others as "gangsters" and "racket men."

The Government seeks to justify the first statement (that Blackoff and Withrow "could expect to be visited by a group of well-known racket men . . .") on the ground that the statement was circumstantial evidence tending either to prove the existence of the conspiracy or to show the state of mind of the listener. It refers us to *Braswell* v. *United States*, 200 F.2d 597 (5 Cir. 1952), to support its contention that the declaration tended to prove the existence of the conspiracy. However, in that prosecution for possession of narcotics, narcotic agents were permitted to testify as to conversations they heard coming from the cabin occupied by the defendants "not as hearsay evidence of the truth of the statements, but as circumstantial evidence of the guilty possession of marihuana." *Id.* at 599. In this case the declaration testified to was not made by an alleged co-conspirator. Hence the only rationale for the admission is that Aiello would not have made the

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6 Judge Croake denied the motion to dismiss in June, 1970. The case was set down for trial to begin August 17, 1970. However, shortly before trial, appellant requested an adjournment, which was granted. Trial finally began on October 26, 1970. Hence the six month figure is exaggerated, and, of course, any delay occasioned by defendant cannot be relied on by him as a ground upon which to assert a denial of the speedy trial right.

statement if a conspirator or some other person had not told him that those men were coming. Reduced to its constituent elements the statement becomes "X told me that 'some well-known racket men' are coming," and this presents a classic example of inadmissible hearsay. Cf. *United States* v. *Bennett*, 409 F.2d 888, 895 n. 6, 897-898 (2 Cir.), *cert. denied, sub nom. Haywood* v. *United States*, 396 U.S. 852 (1969).

The Government's alternate theory to justify the admissibility of the declaration, that the statement was relevant to prove the victim's state of mind, was not suggested at trial, and the court did not instruct the jury with reference to it; therefore we will not consider it.[7] Assuming, then, for the purposes of this case that the admission of this testimony was erroneous, we turn to consider the magnitude of the error in relation to the overall posture of the Government's admissible proof. We can discern no prejudice from a hearsay statement that some unidentified men would make a visit; the existence of any probative value in this statement is dubious. Only the characterization of these men as "well-known racket men" can be objectionable, but inasmuch as appellant's counsel elicited the same characterization of them later in the trial from another source, Aiello's statement is only cumulative, and we deem its admission not to be prejudicial error.

Appellant also complains that another statement made by Aiello that the troublemakers had been located and that they "were connected with other gangsters" was inadmissible, and that, even though the district court had so ruled, the fact that the statement was made prejudiced him. The claim of prejudice arises from the circumstances that, on cross-examination of Blackoff, counsel for appellant re-

7 See, however, *United States* v. *Kennedy*, 291 F.2d 457 (2 Cir. 1961).

turned to the subject by asking Blackoff whether he "knew that he [the appellant] was a racket figure." Blackoff answered "I knew he was in the rackets." and, in the ensuing questions and answers, Blackoff stated he was told so by Aiello. Surely appellant cannot complain that he was prejudiced by the former stricken statement in light of the fact that he re-opened the subject matter himself. Further, the evidence was admitted not as tending to prove that DeMasi and the others were in fact gangsters but only as tending to prove that Blackoff thought they were.

Reversal is also urged because appellant claims that statements regarding his violent nature should have been excluded. While it is generally true that a defendant's character cannot be impeached unless he first puts it in issue, see *Michelson* v. *United States,* 335 U.S. 469 (1948), nonetheless this case does not fall within the general rule. In a Hobbs Act case, the Government must prove that property was extorted from the victim by threats of violence or because of the victim's fear. Hence appellant's bad reputation for violence is relevant as one of the crucial factors in determining this element. Inasmuch as the prosecution provided appellant with advance warning that this evidence would be introduced and the district court carefully cautioned the jury on the limited use of this testimony, there was no error. *United States* v. *Tropiano,* 418 F.2d 1069, 1081 (2 Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970); *Carbo* v. *United States,* 314 F.2d 718 (9 Cir. 1963), *cert. denied,* 377 U.S. 953 (1964). Furthermore, no objection or exception was taken to the admission of this testimony at trial. Fed. R. Crim. P. 52(b).

We find no merit in any of the other claims assigned as error. With reference to the argument that the Government failed to prove an effect on interstate commerce, we

note only that the Club purchased its meat in Connecticut and its liquor both nationally and internationally, and that when the Club closed these deliveries were stopped. The requisite effect was proven. *Katzenbach* v. *McClung,* 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964); *Wickard* v. *Filburn,* 317 U.S. 111 (1942); *United States* v. *Tropiano, supra.*

Affirmed.

APPENDIX B

Order

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of July, one thousand nine hundred and seventy-one.

United State of America,
Plaintiff-Appellee,

v.

James DeMasi,
Defendant-Appellant,

Nichola Melillo, a/k/a Nicky Nelson, et al.,
Defendants.

Order

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated July 20, 1971 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari be and it hereby is granted.

s/ Henry J. Friendly
s/ Sterry R. Waterman

HENRY J. FRIENDLY
STERRY R. WATERMAN

Circuit Judges

APPENDIX C

Order of Affirmance

UNITED STATE COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of July, one thousand nine hundred and seventy-one.

Present:

Hon. Henry J. Friendly, Chief Judge
Hon. Sterry R. Waterman,
Hon. Joseph C. Zavatt,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

JAMES DE MASI

Defendant-Appellant.

Order of Affirmance

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

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No. 71-222.

Supreme Court, U.S.
FILED
SEP 8 1971
E. ROBERT SEAVER

In the Supreme Court of the United States

OCTOBER TERM, 1971

JAMES DEMASI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-222

JAMES DEMASI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of interferring with interstate commerce through attempts to gain control of a night club by force and violence, in violation of the Hobbs Act, 18 U.S.C. 1951, and one count of conspiring to do so, in violation of 18 U.S.C. 371. He was sentenced to concurrent prison terms of ten years. The court of appeals affirmed on July 9, 1971 (Pet. App. A). The petition for a writ of

certiorari was filed on August 12, 1971, and is out of time.

In any event, petitioner's various contentions that he was denied a speedy trial, that the government did not prove an effect on interstate commerce, and that there was reversible error because of the introduction of certain testimony are without merit, as shown in the court of appeals' thorough opinion, on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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